HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

WP 938 of 2003 (M/S)

Sri Ram Prajapati & others Versus Prescribed Authority & ano.

Approved for reporting.

~~Not approved for reporting~~

Date of decision 25.9.2003

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 938 (MS) of 2003

1. Sri Prajapati son of Sri Ram Gopal
2. Sri Rakesh Kumar son of Sri Ram Gopal
3. Sri Dharam Veer son of Sri Ram Gopal
   All residents of village Kirmola, Patti Udaipur Talla, Tehsil Kotdwar, Pauri Garhwal

…….. Petitioners

Versus

1. Prescribed Authority, S.D.M. Kotdwar
2. Additional District Judge, Pauri Garhwal

……. Respondents

Sri J. P. Joshi, Advocate for the petitioners
Standing Counsel for the respondents.

Dated: 25th September 2003

Hon'ble Rajesh Tandon J:

By the present writ petition the petitioners have challenged the order dated 11.7.2003 passed by the lower appellate Court and the order dated 30.3.2001 passed by the Prescribed Authority, in proceedings under section 5 of U.P. Public Premises (Eviction of Unauthorized Occupants) Act, (hereinafter called the "Act").

Heard the learned counsel for the parties. Both the parties are agreed that the matter may be disposed of finally as only a short question is involved in the case regarding the legality of the proceedings of eviction of the petitioners from the land in question.

Brief facts giving rise to this writ petition are that Patwari, Laxmanjhula submitted a challani report before the Prescribed

Authority respondent no.1 alleging that the petitioners have encroached upon 7 x 3 Meters land situated in Khasara No.958 belongs to State Government. The petitioners' father submitted a written statement and denied the fact of unauthorized occupation over the government land. He also challenged service of notice upon him. The petitioners have stated that their grandfather namely Sri Sukhi was granted 2 Nali 2 Muthi Nazool land on Patta on 13.8.1953 by the Deputy Commissioner, Pauri Garhwal. The petitioners are in possession over the land granted to them on patta and have not encroached upon any land belongs to the State Government.

On behalf of the State P.W.1 Ram Charan, Patwari was examined before the Prescribed Authority and filed paper No. A3/8. On behalf of the petitioners a witness namely Ram Gopal was examined D.W.1 and also filed documentary evidence. The learned Prescribed Authority passed the order of eviction against the petitioner on 30.3.2003 in respect of 7 x 3 Sq. meter land. The petitioners have preferred an appeal against the same which was dismissed by the appellate Court vide order dated 11.7.2003.

The short submission of the petitioner's counsel is that there is no dispute with regard to plot no. 905 and 906 which were allotted to the petitioners and no part of the construction is situated on plot no. 958. It was also alleged that compliance of section 4(1) of the Act has not been made. The statement of Ram Gopal, father of the petitioners was also recorded. He state that no constructions were made over plot no. 958 and he made his entire construction over the land allotted to the grand father of the petitioners.

On behalf of the State Sri Ram Charan, Patwari P.W.1 has stated in his statement as follows:

edk rLnhd xke d xokgu g prjke' je'k Hk.Mkjh vkj Lo l[kh d uke ij vkB eBBh Hkfe [kljk u0 905 e utyy Lohdr g ;g Hkfe utyy jftLVj e nt g

yfdu [krkuh e nt ugh gA [krkuh e nt djus dh ftEenkjh jktLo foHkkx dh g A eus bl ckr dh lpuk jftLVkj duuxk dk fy[kdj ugh nh fd Lo0 lD[kh dk uke [krkuh e nt fd;k tk,A Lo dgk fd eus ekf[kd #I l ftLVkj duuxk dk crk;k Fkk fd ukuk tM,a Hkfe dk [kkrk uEcj gkrk gA

In the same statement it has been stated by this witness that he has not mentioned plot numbers and boundary of the land in dispute in his challani report. Relevant part of his statement is as under:

ey ogh d-1 pkykuh fjikVZ e bl pkykuh Hkfe dk [k0[k0 l0 ugh fy[kk gvk g ejs }kjk pkykuh fjikVZ e fookfnr Hkfe dh dkbZ pkgnh ugh fy[kh gA ejs }kjk ekdk rLnhd dh dkbZ fjikVZ ugh cuk;h gA uD’k e Hkh fookfnr Hkfe dh dkbZ pkgnh vfdr ugh dh xbZ gA yVhu [k0 u0 958 e cuh g [k0 u0 905 ,oa 906 [k0 u0 958 e feyku ij g A ;g dguk xyr g fd fookfnr yVhu [k0 u0958 e u cuh gk cfYd 905 e cuh gA

It has been admitted on behalf of the State that plot no. 905 and 906 belong to the petitioners and there is no dispute between the parties regarding possession over these plots. The dispute is with regard to plot no. 958 regarding which it has been alleged that the petitioners have made their latrine over 7 x 3 meters portion of this plot while the petitioners have denied this allegation and stated that they have not encroached upon any portion of plot no. 958.

The learned counsel for the petitioners have contended that no notice under section 4(1) of the Act has been served upon the predecessor of the petitioners and thus the entire proceedings are liable to be vitiated and the prescribed authority has committed an error apparent on the face of the record in directing the eviction of the petitioners. He has placed reliance on the case Kamlesh Kumar Gupta vs. 1st Addl. District and Sessions Judge, Saharanpur and others, 1981 All. L.J. 255. The observation are quoted below:

“The prescribed mode for the notice under Section 4 has been provided in form ‘A’ and the notice for the proceedings under section

7 has been provided in Form 'G'. It is now not more in dispute that the notice, as required under section 4, was not issued. The argument even before the appellate authority, was that the summons, which was issued to the petitioner, would serve the purpose of the notice under section 4."

Similar view has been taken by the Division Bench of Allahabad High Court in 1984 (2) ARC 241, Vgikarama vs. Ivth Addl. District Judge, Varanasi and others, where notice under Section 4 has been held to be mandatory. The observations are quoted below:

In opinion the provisions of Section 4 are mandatory and a valid notice specifying the ground son which the order of eviction is proposed to be made to sine qua non for an order of eviction. We do not agree with the learned Standing counsel that the notice if read as a whole can be construed to be a valid notice under section 4 of the Act. It does not disclose the grounds on which eviction is sought. It is not in the prescribed from either. The defects invalidate the notice ab initio.

The view taken in the case Vikarama vs. Addl. District Judge (supra) has been followed by single Judge in the case Kripal Singh vs. D.J. Nainital, 1988 R.D. 188. The observations are quoted as under:

"As regards the first point, it must be stated at the outset that the notice which was served upon the petitioner was indeed too cursory. Section 4, however, provides that the prescribed Authority shall issue a notice in writing which shall specify the grounds in writing which shall specify the grounds on which the order of eviction is proposed to be made and fix a date by which the affected person is to show cause. The section further makes provision as to how the notice will be served upon persons who may be affected by the proceedings. It is thus apparent that the legislature had intended that

Unless the party sought to be affected is made fully aware of the grounds at the very outset the proceedings shall not begin at all. The only ground in the instant notice. Translated into English, reads as under:

"Unauthorised occupation of the public premises described in the Schedule below:

(details of the two plot numbers given)

To say the least, the notice is wholly vague and does not comply with the requirements of law. The learned counsel for the State, however, said that since the petitioner participated in the proceedings and come to the court with his defence, as such there was no prejudice caused to hi. It was further therefore, argued that it is not open to the petitioner to challenge the invalidity of notice now that the judgment on merits has gone against him. Such an argument must be rejected at once. At the stage when proceedings begin one does not know whether the information conveyed to the prescribed authority is truthful o9r not. If the issuing of notice was a mere formality and could be by passed, the language of section 4 would not have been the same as we find. Question of prejudice, therefore, does not arise where the notice is not incompliance with law. To hold otherwise will negate the very purpose of issuing notice, and citizens may be put to unnecessary harassment by vexatious proceedings under the Act. I, therefore, have no hesitation in holding that the instant notice is bad in the eyes of law and the entire proceedings emanating there from have to be quashed."

Thus it is evident from the aforesaid judgments that notice under section 4(1) of the Act has to be issued showing the grounds for

eviction before proceeding in the case under Section 5 of the Act. In the present case since section 4(1) of the Act having not been complied in the form state aforesaid, therefore, proceeding initiated against the petitioners was not in accordance with the provision of section 4 (1) of the Act.

In order to resolve the controversy as to whether the constructions in dispute are situated on plot nos. 905 and 906 or on plot no. 958, it was necessary for the prescribed authority to have got conducted a proper survey regarding constructions on plot no. 958. It will be proper for the Prescribed Authority to have a fresh survey of the land in dispute. If he has reason to believe that the constructions have been made over plot no. 958, after issuing proper notice, proceedings under section 5 of the Act can be initiated.

Order 26 Rule 9 C.P.C. provides as under:

> 9- ***Commission to make local investigations –*** *In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value or any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*
>
> *Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.*

As will appear from Rule 9 that purpose of Rule 9 is not only to ascertain the possession but also to ascertain the market value of the property, mesne profits, damages or annual net profit and for elucidating any matter in dispute. The court may issue a Commission

directing him to make such investigation and to report thereon to the Court. Order 26 Rule 10 provides procedure of Commissioner.

In A.I.R. 1992 A.P. 300, Chintapatla Arvind Babu and another vs. Smt. K. Balakistamma alias Bhargavi and another, it has been observed that the expression 'local investigation' used in Order 26 Rule 9 C.P.C. is wide enough to include 'localisation with reference to the documents of title'.

It has been held in the case Ram Chandra and another vs. District Judge, Gorakhpur and others 1994 (4) A.W.S. 3405 that evidentiary value of Commissioner's report is to be decided at the time of hearing of the suit. The relevant observations are as under:

"In the present case, the Commissioner was appointed, who had inspected the spot in presence of both the parties who had signed on the field book. He had submitted his report. Acceptance of the report is only an acceptance of the report on the record. Evaluation of the report for the purpose of evidence is to be ascertained at the time of hearing on the basis of the material that might come before the court. the evaluation of the report is to be made on the basis of examination of the commissioner and all these points which are now being taken can very well be put forth while the commissioner is examined. The acceptance of the report does not inso facto make the report admissible into evidence. It does not determine the evidentiary values of the report."

The writ petition, therefore, is allowed. The order passed by the prescribed authority and the lower appellate court are set aside. However, the respondents are at liberty to initiate fresh proceedings against the petitioners after getting a survey of the land in dispute and

after serving notice under Section 4(1) of the Act on the petitioners. No order as to the costs.

(Rajesh Tandon, J.)

25.9.2003

*Dhyani